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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES GOERLICH et al.,

Defendants and Appellants.

C082243

(Super. Ct. No. 14F07074)

Codefendants Charles Goerlich and Marcus Roy were tried together before two juries, and each found guilty of two counts of assault with a deadly weapon and two counts of forcible false imprisonment. The juries found true allegations that Goerlich and Roy personally used firearms within the meaning of Penal Code section 12022.5, subdivision (a).¹

¹ Undesignated statutory references are to the Penal Code.

Goerlich and Roy appeal, arguing the trial court should have instructed their juries, sua sponte, on the defense of felony citizen's arrest. (§ 837) Goerlich separately argues the trial court violated his Sixth Amendment right to confrontation by allowing an uncooperative witness to refuse to respond to certain questions on cross-examination. Roy separately argues the trial court erred in failing to give a unanimity instruction.

We remand on the firearm enhancements, but otherwise affirm the judgments.

I. BACKGROUND

Danielle Goerlich worked the morning shift at AutoZone, an auto parts retailer with a location on Sacramento's Florin Road, on September 21, 2014.² Upon completing her shift, she discovered that a duffel bag had been stolen from her parked car. The duffel bag contained Danielle's wallet, maternity clothes, and other personal items. Danielle, who is Goerlich's sister, called her fiancé, Roy. Goerlich and Roy met Danielle in the AutoZone parking lot shortly thereafter, arriving sometime between 2:00 p.m. and 2:30 p.m.

Goerlich and Roy searched the area and found some of Danielle's clothes in a field behind the store. They also discovered a footpath leading to an unoccupied tent in what appeared to be a homeless encampment. Finding no one, they soon rejoined Danielle in the parking lot. The trio then went out to dinner and a movie. They did not call police, as they did not believe the matter would be considered a high priority.

Richard is a homeless person who has lived in the field behind the AutoZone for the past 15 years. Raymond is Richard's uncle. Raymond and Richard were making their way across the field on the night of September 21, 2014, at approximately 11:00 p.m. They saw flashlights in the area near Richard's campsite. As they drew closer, they encountered two men wearing ski masks and dark colored polo shirts with stars

² For clarity's sake, we shall refer to Danielle by her first name.

embroidered on the chest. The two men held guns and flashlights in a tactical stance, and one of them, who may have identified himself as a police officer, ordered Raymond and Richard to “get the ‘F’ down.” Raymond and Richard immediately complied.

One of the armed men—later identified as Goerlich—ordered Raymond to put his hands behind his back. Raymond complied, and Goerlich bound his hands with zip ties. Raymond, believing both men to be members of a law enforcement task force, began “hollering” and “talking crazy,” demanding to know, “What did we do? Why you doin’ this to us?” Goerlich responded, “Shut up,” and punched Raymond in the face.

Raymond and Richard were both pat searched. One of the armed men retrieved Richard’s wallet and checked his identification. Goerlich said that someone had stolen property out of someone else’s car, and he wanted the stolen property returned. When Raymond and Richard said that they did not know anything about stolen property, Goerlich responded, “Wrong answer.” At one point, Goerlich held a gun to Richard’s forehead and said, “Do you think the police give a fuck about us executing you all out here?” Goerlich then asked Richard if he knew what was inside the gun. Richard responded, “Yes, it’s a bullet.” The other man—later identified as Roy—stayed silent, but kept his gun pointed at Raymond and Richard throughout the encounter.

After approximately four minutes, Goerlich cut the zip tie off Raymond’s hands. Goerlich instructed Raymond and Richard to stay on the ground for 10 minutes. Goerlich and Roy then ran towards the AutoZone parking lot. Raymond watched as a vehicle pulled out of the parking lot. He then walked to his sister’s house, which was nearby, and called 911. Raymond told the 911 operator that he and his nephew had just been stopped by two officers from the Sheriffs’ Department, who ordered them to the ground, handcuffed them, and then kicked or beat them. He described the officers as white men with guns, wearing ski masks and dark shirts with star emblems.

A. *Investigation*

Detective Brian Bell of the Sacramento Police Department was assigned to investigate. Bell learned that an AutoZone employee's car had been broken into, and the employee's relatives had been in the area the night before. Bell interviewed Danielle, who confirmed that Goerlich and Roy had been involved in the incident.

Bell investigated further, and determined that Goerlich and Roy were each the registered owner of a semiautomatic handgun. Search warrants were executed on Goerlich and Roy's homes. Police found a .40-caliber H&K semiautomatic handgun in Goerlich's closet, and a Highpoint 9-millimeter handgun next to Roy's bed. Police also searched Goerlich and Roy's cell phones. On Roy's phone, they found a photograph of a man wearing clothing similar to the clothing that Raymond had described, including a ski mask and dark shirt with a star emblem. Although the man's face was covered, he was recognizable as Roy by virtue of a tattoo on his exposed forearm.

Bell interviewed Goerlich. Goerlich, a former Navy serviceman, admitted having been in the field on the night of the incident, but denied using a gun or zip ties, denied wearing a ski mask or shirt with a star emblem, and denied assaulting anyone. When asked why he returned to the field that night, Goerlich explained that he thought the person living in the homeless encampment might have taken Danielle's wallet, which contained her and her children's social security cards, and he hoped to confront that person and retrieve the social security cards, as he was concerned she might become the victim of identity theft. When asked why he did not call police, Goerlich responded, "In my experience working with police, things don't get done. A report's taken, they interview the parties[,] and then[,] well[,] it's he said, she said, they're saying they didn't, you said they did, this is not worth pursuing for us, have a nice day."

Bell also interviewed Roy. Roy, a former security guard, initially denied having a gun on the night of the incident, adding that he would not have left the house with his gun as he does not have a concealed carry permit, and would not have risked losing his gun

and security guard licenses. As Roy put it, “I know that if I get caught carrying a weapon without a [conceal carry permit], I mean, I could potentially lose my gun rights. I could lose my security license. You know, I could lose a lot of stuff, and I’m not willing to . . . [¶] . . . risk any of that.” Roy also denied possessing or using zip ties, or wearing a mask. Roy later admitted having a gun on the night of the incident, but denied that the gun was loaded and denied pointing it at either of the victims. Roy also admitted that Goerlich had a gun on the night of the incident, and admitted that they had rehearsed their accounts of the incident in anticipation of speaking with police.

Police also recorded a conversation between Goerlich and Danielle, in which Goerlich repeatedly asked, “Which one of you guys rolled on me?” Goerlich also instructed Danielle to tell Roy to “keep his fuckin[’] mouth shut,” adding, “I[’m] gonna fuck him up if he rolled on me.”

Goerlich and Roy were arrested and charged with two counts of assault with a semi-automatic firearm (§ 245, subd. (b)), two counts of forcible false imprisonment (§ 236), and one count of making a criminal threat (§ 422). It was further alleged, as to all counts, that Goerlich and Roy used a firearm in the commission of these offenses. (§ 12022.5, subd. (a).) They were tried together before two juries in March 2016.

B. Jury Trial

During the trial, Raymond and Richard contradicted themselves and one another as to many of the details of the incident, including whether or not Goerlich and Roy identified themselves as police, whether they wore ski masks, whether they restrained Richard with zip ties, and whether they threatened anyone. Despite variations in their testimony, Raymond and Richard both averred that they were confronted by two armed men who ordered them to the ground at gunpoint, questioned and searched them, and instructed them to stay on the ground until they were gone. Both testified that they were badly frightened by the incident.

Richard, who has been homeless for decades, appears to have been particularly shaken. On direct examination, Richard testified that he had been afraid for his life and could not bring himself to return to the field—his home of 15 years—for fear that his assailants might return. Richard acknowledged that he had difficulty remembering some aspects of the incident, adding that he had “nervous problems” that made testifying problematic.

1. Cross-Examination of Richard

Following an uneventful cross-examination by Roy’s counsel, questioning was turned over to Goerlich’s counsel. The cross-examination began well enough, with Richard responding appropriately and cooperatively to questions. The mood changed, however, when Goerlich’s counsel attempted to impeach Richard with his preliminary hearing testimony. The following colloquy occurred:

“[RICHARD:] Do you know what? I’m answering no more of these questions. Because, uhm, you—you know, because it’s getting ridiculous. Stick to the fact of what happened to me.

“[COUNSEL:] I’m getting to that.

“[RICHARD:] No, you’re not.

“[COUNSEL:] Okay.

“[RICHARD:] You are trying to cross me, and I’m not trying to have it.

“[COUNSEL:] Okay.

“[RICHARD:] I’m trying to move on.”

Goerlich’s counsel moved to strike Richard’s testimony. The trial court declined to rule on the motion, stating, “Just ask a question.” Goerlich’s counsel then posed a series of questions about the incident and Richard’s prior testimony. Richard responded that he could not remember to almost every question.

Things went downhill from there. Richard refused to respond to the next set of questions, stating, “I answered all that already” and “I’m through with that.” The

prosecutor, taking cues from Richard, objected on the ground that the questions had been asked and answered, and the trial court sustained the objections.

The cross-examination continued in this manner for some time, with Richard responding to some questions, and refusing to respond to others. Richard appears to have reached his limit when asked whether his assailants wore a shirt with a star emblem, stating, “Next question. I’m—I answered all that already. I don’t—I don’t know how to answer that, so I’m not even going to try—even try. I want to stick to the point. I’m the victim in this. Right now, my nerves are so bad. I’m not answering no more of your questions. If there’s same question you comin’ back at me with right now, I’m not going to answer it, ‘cause it hurts for me to even be going through it—this information right now. Ask me a simple question.”

Goerlich’s counsel pressed on, posing a new series of questions about the incident. Richard, now seemingly fed up with the entire process, mostly refused to respond, stating either, “I answered that question already” or “I don’t remember.” When Goerlich’s counsel again attempted to impeach Richard with prior inconsistent statements from the preliminary hearing, Richard erupted, “Get back to the facts of the case. I’m a victim in this case. You treat me like I’m a criminal. I’m not going to answer no more of your questions.” The following colloquy then took place:

“[COUNSEL:] You are a criminal. You’ve been convicted of crimes.

“[TRIAL COURT:] I’ll sustain that—objection. That [w]as argumentative the way it was phrased. If you want to impeach him, you may do so.

“[COUNSEL:] You have a prior felony conviction, don’t you?

“[RICHARD:] I don’t remember none of that.

“[COUNSEL:] You don’t remember?

“[RICHARD:] No.

“[COUNSEL:] Being convicted, felony receiving stolen property?

“[RICHARD:] What does that got to do with me being a victim? I’m not going to answer that.

“[COUNSEL:] Okay.

“[RICHARD:] That ain’t got nothin’ to do with this case. What my past got to do with this case. Stick—

“[COUNSEL:] But you are a convicted felon.

“[RICHARD:] No, I’m not.

“[COUNSEL:] You are not a convicted felon?

“[RICHARD:] No.

“[COUNSEL:] Okay.

“[RICHARD:] Stick to the basis of the case, why I’m here. I’m here for something that happen to me. How would you feel if somebody took guns, flashlights in your eyes and threaten you and terrorize you and traumatize you for 15 to 20 minutes? And you sittin’ there asking me all these all weird questions. Stick to the facts of the case.

“[COUNSEL:] Well, if somebody ran up to me in an aggressive manner, I may have to take aggressive actions.

“[RICHARD:] Well—well, would—that’s your—that’s—that ain’t got nothin’ to do with me. I’m sticking to this case right now. I’m not going to answer none of your questions no more. So you be through with it. Go to lunch or something.”

Goerlich’s counsel concluded his cross-examination shortly thereafter. The parties later stipulated that Richard had suffered seven felony convictions between 1987 and 2000.

2. *Goerlich’s Testimony*

Goerlich testified in his own defense. On direct examination, Goerlich admitted he was in the field on the night of the incident, admitted he had a gun, and admitted he hit and zip tied Raymond. Goerlich explained that he returned to the field in hopes of

recovering the social security cards stolen from Danielle, which he believed to have been taken by the person living in the homeless encampment. Goerlich denied that he planned to assault anyone that night, and insisted that he was acting in self-defense to subdue Raymond, who was aggressive and physically threatening. When asked why he returned to the field rather than call police, Goerlich responded, “I didn’t believe the cops would be useful in trying to get the stuff back ‘cuz I knew we couldn’t prove it so at that point that’s where my judgment was. I want the stuff back. [¶] But it was poor judgment going out into a field at night off Florin Road. That was dumb.” When asked why police were not called after the confrontation with Raymond and Richard, Goerlich responded, “The interaction got way too out of hand at that point. You know at that point, who’s really going to call the police and go hey, I just want to let you guys know I went somewhere I wasn’t supposed to go. I took a gun that I wasn’t licensed to carry on me on [my] person. [¶] I then had to pull it out on them, regardless of the reason oh, and by the way, I then punched one of them and got into a fight with one of them and then had to zip tie him. [¶] Would you guys come and arrest them, please?” Goerlich concluded, “Oh, yeah. At that point, yeah. I don’t think [I] would call up and say that.”

On cross-examination, Goerlich affirmed that he did not call police before returning to the field because he could not prove the person or persons living there were responsible for the theft of Danielle’s duffel bag, and he did not believe the police would do anything to help. When asked whether he thought it would have been a good idea to call police after the confrontation with Raymond and Richard, Goerlich responded, “Not when I’m carrying a firearm on me without a [concealed carry permit], no.”

3. Closing Arguments

During closing arguments, the prosecutor acknowledged that Raymond and Richard had credibility issues, but emphasized the substantial overlap in their testimony, which was corroborated in numerous respects by Goerlich. The prosecutor dismissed Goerlich and Roy’s self-defense theory as “absurd in light of the fact that they rolled up

with tactical flashlights, firearms, zip ties, ski masks and they appeared in every way to be task force officers.”

As anticipated, defense counsel cast doubt on Raymond and Richard’s credibility, with both attorneys emphasizing the fact that Richard lied about not having a criminal record. Goerlich’s counsel went a step further, identifying inconsistencies between Richard’s preliminary hearing and trial testimony, and commenting on Richard’s erratic behavior on the stand. As Goerlich’s counsel argued: “Obviously, Mr. Richard didn’t want to be cooperative with me. That’s just his general demeanor. I mean, he can’t—even in a formal setting, he just—he just can’t do the right thing. He was being very uncooperative with me. I couldn’t really get him to answer any question. [¶] But I—I impeached him. And what I mean by impeached, I confronted him with prior testimony he gave at a hearing like this under oath.”

Goerlich and Roy’s counsel both acknowledged that the decision to return to the field that night had been “horribly bad” and “a stupid mistake.” Goerlich’s counsel argued, “He thought he could outsmart the cops, whatever the case may be, because he knew that he was just absolutely wrong. He’s not a cop. You don’t go out and investigate things. You’re not a cop. You can’t go out in public with a gun.” Neither attorney suggested that Goerlich and Roy had gone to the field to make a citizen’s arrest.

4. Verdicts and Judgments

As noted, Goerlich and Roy were tried together before two juries. In March 2016, the juries found Goerlich and Roy guilty of two counts of assault with a semi-automatic firearm (§ 245, subd. (b)) and two counts of forcible false imprisonment (§ 236). The juries found true the allegations that Goerlich and Roy personally used firearms in the commission of the offenses. Roy’s jury found him not guilty of making criminal threats (§ 422), and Goerlich’s jury could not reach a verdict on that charge. The trial court declared a mistrial on the criminal threats charge as to Goerlich.

Goerlich and Roy appeared for judgment and sentencing on June 6, 2016. Following argument, Goerlich was sentenced to an aggregate term of 13 years in state prison. The trial court then turned to Roy, who was now represented by new counsel. Prior to sentencing, Roy's new counsel moved to dismiss the case pursuant to sections 1118.1 (judgment of acquittal) and 1385 (dismissal in furtherance of justice) on the ground that Goerlich and Roy had been authorized to detain Raymond and Richard as they had been attempting to make a citizen's arrest. The trial court denied the motion and sentenced Roy to an aggregate term of seven years in state prison.

Goerlich and Roy filed timely notices of appeal.

II. DISCUSSION

A. Citizen's Arrest

Goerlich and Roy argue the trial court had a sua sponte duty to instruct on the defense of felony citizen's arrest based on evidence that Danielle's car was burglarized, and there was reason to believe the person or persons living in the field committed the burglary. The People respond that the trial court had no sua sponte duty to instruct on the defense, as there was no evidence that Goerlich and Roy were attempting to make a citizen's arrest. We agree with the People.

"We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.) We also review de novo whether the trial court has a duty to give a particular instruction sua sponte. (*People v. Simon* (2016) 1 Cal.5th 98, 133; *People v. Guianan* (1998) 18 Cal.4th 558.)

" "It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence" ' and ' "necessary for the jury's understanding of the case." ' [Citations.] It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense

and the defense is not inconsistent with the defendant’s theory of the case.’ ” (*People v. Brooks* (2017) 3 Cal.5th 1, 73.) “A trial court has no duty to instruct the jury on a defense—even at the defendant’s request—unless the defense is supported by substantial evidence.” (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Substantial evidence is not synonymous with any evidence, no matter how weak. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227-1228.) It is, rather, evidence sufficient to deserve consideration by the jury, or evidence a reasonable jury could find persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

Goerlich and Roy argue there was substantial evidence supporting a defense instruction under section 837. Under section 837, a private citizen may arrest another when, among other things, a felony has been committed and the citizen has reasonable cause to believe that the person arrested committed it. (§ 837, subd. (3); *People v. Fosselman* (1983) 33 Cal.3d 572, 579.)³ The person making the arrest may use reasonable force to detain the arrestee (*Fosselman, supra*, at p. 579; § 835), and the arrestee has a duty not to resist the use of reasonable force to effect the arrest. (*Fosselman, supra*, at p. 579; *People v. Adams* (2009) 176 Cal.App.4th 946, 952.) A

³ Section 837 provides:

“A private person may arrest another:

- “1. For a public offense committed or attempted in his presence.
- “2. When the person arrested has committed a felony, although not in his presence.
- “3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.”

Goerlich and Roy rely on section 837, subdivision (3).

lawful citizen's arrest is a defense to false imprisonment. (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 280, p. 1108.)

Goerlich and Roy argue the trial court should have instructed the juries with the defense of felony citizen's arrest, because there was substantial evidence that felony vehicular burglary had been committed, and they had reasonable cause to believe that Raymond and Richard were responsible.⁴ Goerlich and Roy acknowledge the absence of evidence suggesting they intended to effectuate a citizen's arrest, but maintain that no such evidence was necessary. Instead, arguing by analogy to Fourth Amendment jurisprudence, Goerlich and Roy contend the circumstances surrounding the detention of Raymond and Richard must be considered "objectively," without regard to their subjective intentions. (See *Whren v. United States* (1996) 517 U.S. 806, 813 ["Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"]; *People v. Alvarez* (2016) 246 Cal.App.4th 989, 1002 ["Whether an officer has probable cause to effectuate an arrest is an objective standard, and the 'secret intentions, hopes, or purposes' of the arresting officer are not relevant to the legality of the arrest"].) Taking their argument a step further, Goerlich and Roy argue that their actions, viewed objectively, amounted to substantial evidence that they were making a felony citizen's arrest in the field that night, such that the trial court had a duty to instruct the jury with the defense. Goerlich and Roy's argument cannot be squared with the statutory scheme or the record evidence.

The statutory scheme of which section 837 is a part makes clear that, regardless of the subjective intent with which it is done, a private person making a citizen's arrest must

⁴ Reasonable cause, in the context of section 837, "is defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." (*People v. Wilkins* (1972) 27 Cal.App.3d 763, 768.)

manifest an objective intention to do so. Section 841 provides, with exceptions not here applicable, that “[t]he person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it.” (See *People v. Score* (1941) 48 Cal.App.2d 495, 498 [applying § 841 to a citizen’s arrest].) Section 847, subdivision (a) provides that, “[a] private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him or her to a peace officer.” Reading the statutory scheme as a whole, we are convinced that a private person making a citizen’s arrest must manifest an objective intention to effectuate an arrest and deliver the arrestee to police. Although no “magic words” are required (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1032), there must be some objective indicia from which an intent to effectuate a citizen’s arrest may be inferred. (*Id.* at pp. 1030-1031 [a private person making a citizen’s arrest need not physically take the suspect into custody, but may delegate that responsibility to an officer, and the act of arrest “may be implied from the citizen’s act of summoning an officer, reporting the offense, and pointing out the suspect”].) No such indicia of intent appear on the record before us. To the contrary, the record makes clear that Goerlich and Roy had no intention of involving police, as they knew they were carrying their guns illegally, and were not prepared to accept the consequences of doing so. Goerlich and Roy offer no authority suggesting that a private person may detain another following the commission of a possible felony (which, in this case, occurred some seven hours earlier) without intending to involve police, and we decline to so hold.

“[A] trial court has no obligation to instruct sua sponte on a defense supported by ‘minimal and insubstantial’ evidence.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152; accord *People v. Simon* (2016) 1 Cal.5th 98, 132.) Here, to the extent there was any evidence to support a defense under section 837, that evidence can only be described as “minimal and insubstantial.” (*Barnett, supra*, at p. 1152.) The mere fact that Goerlich

and Roy detained Raymond and Richard was not evidence of a citizen's arrest sufficient to warrant consideration by either of their juries, even assuming *arguendo* they had reasonable cause to believe Raymond and Richard were responsible for stealing Danielle's duffel bag some seven hours earlier. (*Id.* at pp. 1151, 1152 [trial court had no duty to instruct the jury with the defense of felony citizen's arrest, despite the defendant's reference to an arrest, where "there was no evidence from which a reasonable juror could infer that the kidnappings here, which occurred hours after the claimed reference to an arrest, were undertaken for the purpose of aiding in the arrest or in notification of the authorities"]; see also *People v. Zinda* (2015) 233 Cal.App.4th 871, 879 [trial court had no sua sponte duty to instruct the jury with justifiable homicide in making an arrest where, as here, there was no evidence or argument that the defendant was attempting to effect an arrest].) The trial court had no sua sponte duty to instruct the jury with the defense of felony citizen's arrest.

B. Confrontation Clause

Goerlich contends the trial court violated his confrontation rights by allowing Richard to refuse to respond to questions on cross-examination. The People respond that Goerlich's confrontation clause claim has been forfeited. We agree with the People. Nevertheless, we exercise our discretion to address the constitutional issue on the merits to forestall the claim that Goerlich's counsel provided constitutionally ineffective assistance by failing to raise the issue at trial. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 621; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.)

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be confronted with witnesses against him. The United States Supreme Court has held the confrontation right is " 'fundamental' " and " 'is made obligatory upon the States by the Fourteenth Amendment.' " (*Pointer v. Texas* (1965) 380 U.S. 400, 403.) " 'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " (*Davis v. Alaska* (1974) 415 U.S.

308, 315-316, italics omitted.) “Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.” (*Id.* at p. 316.) Hence, the “constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility” (*People v. Szadziwicz* (2008) 161 Cal.App.4th 823, 841-842), and “ ‘cross-examination to test the credibility of [the] witness is to be given wide latitude’ ” (*People v. Redmond* (1981) 29 Cal.3d 904, 913, disapproved on other grounds in *People v. Cortez* (2016) 63 Cal.4th 101, 117-121).

“ ‘ “[T]he Confrontation Clause guarantees only ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.’ ” [Citations.]’ [Citation.] [¶] That opportunity may be denied if a witness refuses to answer questions, but it is not denied if a witness cannot remember. A witness who ‘refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness. [Citations.]’ [Citations.] [¶] By contrast, a witness who suffers from memory loss—real or feigned—is considered ‘subject to cross-examination’ because his presence and responses provide the ‘jury with the opportunity to see [his] demeanor and assess [his] credibility.’ ” (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1390-1391.)

Goerlich was provided an adequate opportunity to cross-examine Richard. Although Richard was frequently uncooperative, he responded substantively to many of defense counsel’s questions, including several specific questions about the incident. Unlike *People v. Rios* (1985) 163 Cal.App.3d 852, on which Goerlich relies, this was not a case in which the witness refused to answer any questions at all. The jury had ample opportunity to observe Richard’s demeanor and evaluate his credibility. (*People v.*

Foalima, supra, 239 Cal.App.4th at pp. 1390-1391.) While Richard’s refusal to answer many of defense counsel’s questions “ ‘narrowed the practical scope of cross-examination, [his] presence at trial as a testifying witness gave the jury the opportunity to assess [his] demeanor and whether any credibility should be given to [his] testimony or [his] prior statements. This was all the constitutional right to confrontation required.’ [Citation.]” (*People v. Homick* (2012) 55 Cal.4th 816, 861.) Furthermore, Richard was a prosecution witness and, “to the extent that his behavior on the stand reflected poorly on his credibility, it benefited defendant.” (*Ibid.*) Indeed, Goerlich’s counsel urged the jury to consider Richard’s uncooperative demeanor during closing argument, adding that, despite Richard’s failure to conform to courtroom procedure and protocol, “I impeached him.”

We conclude that Richard’s testimony did not violate Goerlich’s confrontation rights, and therefore, Goerlich’s counsel did not render ineffective assistance by failing to object. (*People v. Linton* (2013) 56 Cal.4th 1146, 1168 [where there was no sound basis for counsel to have objected to admission of evidence, counsel’s failure to object cannot establish ineffective assistance]; *People v. Bradley* (2012) 208 Cal.App.4th 64, 90 [“Failure to raise a meritless objection is not ineffective assistance of counsel”].)

C. *Unanimity Instruction*

Roy separately argues the trial court erred in failing to give a unanimity instruction. Specifically, Roy maintains that a unanimity instruction was necessary because the prosecutor argued he could be found guilty of assault either as a direct perpetrator (by pointing his own gun at Raymond and Richard) or as an aider and abettor (by assisting in Goerlich’s criminal acts, which included holding a gun to Richard’s forehead). We find no reversible error.

“As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the

information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty.” (*People v. Jennings* (2010) 50 Cal.4th 616, 679; accord *People v. Maury* (2003) 30 Cal.4th 342, 422-423.) “There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation], or ‘when . . . the statute contemplates a continuous course of conduct or a series of acts over a period of time.’ [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime.” (*Jennings, supra*, at p. 679; see *People v. Carrera* (1989) 49 Cal.3d 291, 311-312.)

Here, Raymond and Richard each testified to a continuous course of criminal conduct by Goerlich and Roy, beginning from the moment they were confronted with guns in the field, continuing as they were ordered to the ground at gunpoint, escalating as Goerlich restrained Raymond with zip ties and threatened Richard with a gun to the forehead, and ending when the vigilantes left the field, a short time later. As the People observe, the encounter was brief—approximately four minutes, by Raymond’s reckoning—and the assaultive acts occurred within moments of one another, in the same location, and with the same objective. Under similar circumstances, courts have routinely found a continuous course of conduct, obviating the need for a unanimity instruction. (See, e.g., *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275 [continuous course of conduct where defendant made a series of false statements during a medical visit to fraudulently obtain benefits; the statements were connected in time and purpose, were made at the same appointment, were interrelated, and were all aimed at a single objective]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [continuous course of conduct where acts occurred “just minutes and blocks apart and involved the same property”]; *People v. Mota* (1981) 115 Cal.App.3d 227, 233 [the continuous course of

conduct exception applied when the victim was “repeatedly and continuously raped and assaulted by three men inside the back of the van in a short period of time”].)

Roy argues against the application of the continuous course of conduct exception, emphasizing the fact that the prosecutor characterized the act of holding a gun to Richard’s forehead as a “separate act” of assault. We do not believe the prosecutor’s remark renders the continuous course of conduct exception inapplicable, particularly in view of the prosecutor’s subsequent argument, which made clear that the assault with a semi-automatic firearm charge was based on a course of assaultive conduct. But even assuming the trial court erred in failing to give a unanimity instruction, any error was harmless.

A split of authority exists on whether the standard of prejudicial error outlined in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) or that outlined in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) applies to a unanimity instruction error. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545.) A majority of published California cases have applied the *Chapman* standard. (See *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186-188 [applying *Chapman*]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472 [same]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying *Watson*]; and *People v. Curry* (2007) 158 Cal.App.4th 766, 783 [noting conflict].) Under *Chapman*, the failure to give a unanimity instruction is harmless “ ‘[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any’ ” (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 577.)

There was no dispute that Goerlich and Roy were in the field with guns drawn that night. However, though Roy admitted to having been in the field with a gun, he denied that either of the acts alleged to have constituted the assault occurred. With respect to the act of pointing guns at Raymond and Richard, Roy argued that he and Goerlich drew

their guns in self-defense, but did not point them at the victims. With respect to the act of holding a gun to Richard's forehead, Roy argued that the incident never happened, but was instead a figment of Richard's imagination.

The jury unanimously found Roy guilty of assaulting Raymond with a semi-automatic firearm, indicating that they rejected the argument that guns were drawn but not pointed, and believed that Roy either pointed his own gun at Raymond, or aided and abetted Goerlich in so doing. The jury was not given any reason to believe that Roy or Goerlich (aided and abetted by Roy) pointed a gun at Raymond, but not Richard. To the contrary, Raymond testified that guns were trained "on us" "the whole time." Goerlich, on cross-examination, similarly affirmed that Raymond and Richard were next to one another, and guns were pointed at "them." In the circumstances of this case, where the single assaultive act against Raymond was substantially identical to one of two assaultive acts against Richard, we can confidently say that any juror believing that guns were pointed at Raymond would have also believed that guns were pointed at Richard. Given the jury's finding that Roy was guilty of assaulting Raymond with a semi-automatic firearm, there was no risk that jurors disagreed as to whether Roy was guilty of simultaneously assaulting Richard, even assuming they divided on the question of whether Goerlich held a gun to Richard's forehead. (Cf. *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [unanimity instruction not necessary where any jury that believed one act occurred would inexorably believe all acts occurred].) Therefore, even if we were to conclude the unanimity instruction should have been given, we would find the failure to do so harmless under any standard.

D. Senate Bill No. 620

After briefing in this case was completed, the Legislature passed and the Governor signed Senate Bill No. 620, which amended section 12022.5, subdivision (c) to give trial courts discretion to strike certain firearm enhancements in the interest of justice. (Stats. 2017, ch. 682, § 1.) Goerlich and Roy filed supplemental briefs, asserting Senate Bill

No. 620 applies retroactively to cases not yet final and, therefore, we should remand for the trial court to determine in its discretion whether to strike the firearm enhancements the court imposed on them. The People agree with Goerlich and Roy on this point, and so do we.

Effective January 1, 2018, Senate Bill No. 620 authorizes a court to exercise its discretion under section 1385 to strike or dismiss a firearm enhancement allegation or finding made pursuant to sections 12022.5 and 12022.53. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) However, the legislation does not expressly declare whether it applies to cases not yet final as of January 1, 2018, in which firearm enhancements were imposed.

Generally, amendments to the Penal Code apply prospectively. But California law recognizes an exception for amendments that reduce the punishment for a specific crime. Courts presume the Legislature intends those amendments to apply retroactively to all nonfinal judgments absent a saving clause or other clear evidence the Legislature intended otherwise. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745, 748.) The presumption applies to amendments that give the trial courts discretion to impose a lower sentence. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) We agree with the parties that, pursuant to this presumption, Senate Bill No. 620 applies retroactively to Goerlich and Roy's cases, which are not yet final.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Here, the trial court had no discretion at sentencing regarding the firearm enhancements under section 12022.5, subdivision (a). Thus, we will remand to permit the trial court to consider exercising the discretion conveyed by Senate Bill No. 620.

III. DISPOSITION

The matter is remanded solely for the trial court to reconsider the firearm enhancements imposed on Goerlich and Roy under section 12022.5, subdivision (a), as authorized under section 12022.5, subdivision (c). In all other respects, the judgments are affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.